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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

THERESA A. BURKE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICUS CURIAE OF THE UNITED AIR LINES PILOT GROUP IN SUPPORT OF RESPONDENTS

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17

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	
I. THERE IS NO BASIS FOR EXCLUDING TORT VICTIMS FROM COVERAGE BY SECTION 104(A)(2) MERELY BECAUSE THEIR DAMAGES ARE MEASURED BY A LOSS OF EARNINGS	3
II. THE COURT SHOULD RESIST THE GOVERNMENT'S SUGGESTION TO EXTEND ITS ANALYSIS OF THE TAXPAYERS' CASE TO ADEA CLAIMANTS NOT BEFORE THE COURT	9
CONCLUSION	12

TABLE OF AUTHORITIES

Cases PAGE

Ashland Oil, Inc. v. *Commissioner*, 95 T.C. 348 (1990) 5

Bent v. *Commissioner*, 835 F.2d 67 (3d Cir. 1987) . 5

Brooklyn Savings Bank v. *O'Neil*, 324 U.S. 697 (1945) 10

Byrne v. *Commissioner*, 883 F.2d 211 (3d Cir. 1989) 5

Commissioner v. *Glenshaw Glass Co.*, 348 U.S. 426, *rehearing denied*, 349 U.S. 925 (1955) ... 3

Downey v. *Commissioner*, 97 T.C. 150 (1991) 2, 5, 9

Keller v. *Commissioner*, 62 T.C.M. 401 (1991) ... 2, 9

Lorillard v. *Pons*, 434 U.S. 575 (1978) 11

Madson v. *Commissioner*, 55 T.C.M. 1351 (1988) . 5

Metzger v. *Commissioner*, 88 T.C. 834 (1987), *aff'd without published opinion*, 845 F.2d 1013 (3d Cir. 1988) 5

M. Rosenberg & Sons v. *Craft*, 182 Va. 512, 29 S.E.2d 375 (1944) 8

Miller v. *Commissioner*, 914 F.2d 586 (4th Cir. 1990) 10

Missouri Pacific Railroad Co. v. *Harelson*, 238 Ark. 452, 382 S.W.2d 900 (1964) 8

Overnight Motor Transp. Co., Inc. v. *Missel*, 316 U.S. 572 (1942) 10

Pistillo v. *Commissioner*, 912 F.2d 145 (6th Cir. 1990) 5, 9

Provost v. *United States*, 269 U.S. 443 (1926) 11

Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989) . 4

Redfield v. *Ins. Co. of North America*, 940 F.2d 542 (9th Cir. 1991) 9

Rickel v. *Commissioner*, 900 F.2d 655 (3d Cir. 1990), *aff'g in part, rev'g in part*, 92 T.C. 510, 521-22 (1989) 5, 7, 9, 10

Roemer v. *Commissioner*, 716 F.2d 693 (9th Cir. 1983) 4, 8

Rome I, Ltd. v. *Commissioner*, 96 T.C. 695 (1991) . 6

Schager v. *Upjohn*, 913 F.2d 398 (7th Cir. 1990) . 4

Thompson v. *Commissioner*, 866 F.2d 709 (4th Cir. 1989) 4, 5, 7, 10

Threlkeld v. *Commissioner*, 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988) 5, 8

Tijerina v. *Cornelius Christian Church*, 273 Or. 58, 539 P.2d 634 (1975) 8

Trans World Airlines, Inc. v. *Thurston*, 469 U.S. 111 (1985) 10

United States v. *American Trucking Associations, Inc.*, 310 U.S. 534 (1940) 3

Statutes

26 U.S.C. § 104(a)(2) ..... *passim*

29 U.S.C. § 206(d) 6

29 U.S.C. § 216(b) 4, 6

29 U.S.C. § 621 *et seq.* 1, 9

Pub. L. 101-239, § 7641(a), 103 Stat. 2106 7

Regulations

26 C.F.R. § 1.104-1(c) 3, 4

Legislative History

H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess., *reprinted in* 1989 U.S. Code Cong. & Admin. News 3225-26 11

H.R. Ways and Means Committee, *Revenue Reconciliation Bill of 1989, Explanation of Revenue Provisions* (September 14, 1989) 11

Miscellaneous

H.R. 3299 11

SM 957, 1 C.B. 65 (1919) 6

SM 1384, 2 C.B. 71 (1920) 6

Sol. Op. 132, I-1 C.B. 92 (1922) 6

Rev. Rul. 58-418, 1958-2 C.B. 18 6

Rev. Rul. 74-77, 1974-1 C.B. 33 6

Rev. Rul. 75-45, 1975-1 C.B. 47 6

Rev. Rul. 84-108, 1984-2 C.B. 32 6

Rev. Rul. 85-98, 1985-2 C.B. 50 ..... 6, 8

IRS Publication 525 (Rev. Nov. 1983) 7

Black's Law Dictionary (5th ed. 1979) 3

Prosser and Keeton, *Law of Torts* (5th Ed. 1984) . 4

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BRIEF AMICUS CURIAE OF THE UNITED AIR LINES PILOT GROUP IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE [1]

The United Air Lines Pilot Group is the informal designation for a group of approximately 85 former employees of United Air Lines, Inc., whose cases before the United States Tax Court present the common issue of taxation of settlement proceeds received under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (the "ADEA").

[1] The parties have consented to the filing of this brief.

Shortly after the decision of the Tax Court in *Downey* v. *Commissioner*, 97 T.C. 150 (1991), the Tax Court granted a motion for summary judgment in favor of the taxpayer in the test case selected by the United Air Lines Pilot Group. *Keller* v. *Commissioner*, 62 T.C.M. 401 (1991). The Commissioner of Internal Revenue has obtained a stay of further proceedings before the Tax Court in *Keller* and related cases pending the disposition of the Government's action before the Supreme Court, on the ground that the tax treatment of the United Air Lines Pilot Group may be affected by either an affirmance or a reversal of the decision of the Sixth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

The exclusion of personal injury damages from gross income does not distinguish among tort victims (or other persons asserting tort type rights) on the basis of whether their damages reflect lost earnings. Rather, it looks broadly to the nature of the injury by analogy to principles of tort and tort type laws.

No court has disagreed with the proposition that ADEA liquidated damages are excludable from gross income under Section 104(a)(2). Congressional reenactment of the statute at a time when courts were rejecting the Commissioner's attempt to tax ADEA liquidated damages implicitly confirms such excludability.

ARGUMENT

I. THERE IS NO BASIS FOR EXCLUDING TORT VICTIMS FROM COVERAGE BY SECTION 104(A)(2) MERELY BECAUSE THEIR DAMAGES ARE MEASURED BY A LOSS OF EARNINGS

Section 104(a)(2) of the Internal Revenue Code meets the requirement imposed by *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431, *rehearing denied*, 349 U.S. 925 (1955), that exemptions from taxation be supported by clear expressions of Congressional intent. Its language could not be plainer:

> [G]ross income does not include:
>
> . . .
>
> the amount of *any* damages received . . . on account of personal injuries. (Emphasis added.)

The plain meaning of a statute should not be disregarded except to prevent an absurd result or one that is contrary to legislative intent. *United States* v. *American Trucking Associations., Inc.*, 310 U.S. 534, 543 (1940).

The already broad statutory language of Section 104(a)(2) has been amplified by the regulations to include proceeds from the "prosecution of a legal suit or action based upon tort or tort type rights." 26 C.F.R. § 1.104-1(c).[2] No au-

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[2] Black's Law Dictionary defines "tort" broadly:

> A private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages.
>
> . . .
>
> A legal wrong committed upon the person or property independent of contract. *Black's Law Dictionary* 1335 (5th ed. 1979).

The breadth of tort law is an acknowledged feature of the English common law:

(Footnote continued on following page)

thority has suggested restricting Section 104(a)(2) to a snapshot of certain causes of action recognized as of 1918. On the contrary, by employing an evolutionary term derived from, but not confined to,[3] the common law, the Commissioner's regulations explicitly link the tax treatment under Section 104(a)(2) to a living, if not protean, body of law.[4]

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[2] *continued*

Tort obligations are in general obligations that are imposed by law—apart from and independent of promises made and therefore apart from the manifested intention of the parties—to avoid injury to others. By injury here is meant simply the interference with the individual's interest or an interest of some other legal entity that is deemed worthy of legal protection. Prosser and Keeton, *Law of Torts* (5th Ed. 1984) at 655.

[3] *Cf.* 26 C.F.R. § 1.104-1(c) ("tort or tort type rights"). Section 104(a)(2) extends beyond pure common law torts to statutory actions. *See, e.g., Roemer* v. *Commissioner*, 716 F.2d 693 (9th Cir. 1983) (codification of libel under California law); *Thompson* v. *Commissioner*, 866 F.2d 709 (4th Cir. 1989) (liquidated damages under the Equal Pay Act of 1963, 29 U.S.C. § 216(b)).

[4] New torts have arisen in the interval between the enactment of the predecessor of Section 104(a)(2) in 1918 and the taxable year in question. *See, e.g.*, Prosser and Keeton, at 60 (the intentional infliction of emotional distress by extreme conduct came into being "somewhere around 1930") and at 849 (scholars recognized the invasion of the right of privacy as developing in the early years of the 20th century). The same scholars identify a distinct modern trend of "economic retaliation," embracing tort-type injuries of employers to their employees. Prosser and Keeton, *supra*, at 1027.

The evolution of the concept of tort-type rights is not limited to actions under the common law, but includes statutory or legislative torts based on tort-type principles. *See, e.g.*, Prosser and Keeton at 1027, n. 24 (sex discrimination under Title VII and age discrimination under the ADEA cited as examples of statutory torts). *Cf. Schager* v. *Upjohn*, 913 F.2d 398 (7th Cir. 1990). In *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 264 (1989), Justice O'Connor likened "the statutory employment 'tort' created by Title VII" to the common law of torts.

The courts have adopted a straightforward definition of "personal injury" for purposes of Section 104(a)(2): any invasion of "the rights that an individual is granted by virtue of being a person in the sight of the law." *Rickel* v. *Commissioner*, 900 F.2d 655, 663, *quoting Threlkeld* v. *Commissioner*, 87 T.C. 1294, 1308 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988). Among the fundamental human rights recognized by courts construing Section 104(a)(2) are freedom of speech,[5] freedom from discrimination on the basis of sex[6] or age,[7] equal protection under the constitution,[8] and freedom from discrimination on the basis of national origin.[9] The Court of Appeals for the Sixth Circuit was adhering to this line of cases.

The Government offers no reasoned alternative to the courts' interpretation of the key statutory term, "personal injury." The essence of the Government's argument is that being treated unfairly in the workplace because of one's gender is in no sense an invasion of basic personal rights, but represents only a downward adjustment in an employment contract.

The revenue rulings on which the Government bases its position do not carry the force of law:

> Revenue rulings represent only the Commissioner's position concerning specific factual situations, rather than substantive authority for deciding a case in this Court. *Ashland Oil, Inc.* v. *Commissioner*, 95 T.C. 348, 360 (1990).

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[5] *Bent* v. *Commissioner*, 835 F.2d 67 (3d Cir. 1987).

[6] *Thompson*, *supra*; *Byrne* v. *Commissioner*, 883 F.2d 211 (3d Cir. 1989).

[7] *Rickel*, *supra*; *Pistillo*, 912 F.2d 145 (6th Cir. 1990); *Downey*, *supra*.

[8] *Madson*, 55 T.C.M. 1351 (1988).

[9] *Metzger*, 88 T.C. 834 (1987), *aff'd without published opinion*, 845 F.2d 1013 (3d Cir. 1988).

> This Court or any other court may adopt the conclusion and rationale of a revenue ruling; however, revenue rulings typically do not constitute substantive authority for a position, since "absent special circumstances, a revenue ruling merely represents the Commissioner's position with respect to a specific factual situation." *Rome I, Ltd.* v. *Commissioner*, 96 T.C. 695, 702 (1991), *quoting Tandy Corp.* v. *Commissioner*, 92 T.C. 1165, 1170 (1989), *citing Stark* v. *Commissioner*, 86 T.C. 243, 250-251 (1986).

Indeed, apart from their lack of precedential value, the announced legal positions of the Commissioner of Internal Revenue under Section 104(a)(2) and its predecessors are unreliable guides, because they show an unstable pattern of attempts to inject implied limitations into the statute.

The argument that personal injury encompassed only physical injuries was initially adopted, only to be quickly abandoned.[10] Punitive damages in personal injury actions have been subject to contradictory interpretations.[11] Despite the fact that liquidated damages under the Equal Pay Act, 29 U.S.C. § 206(d), and liquidated damages under the ADEA are authorized by the same provision in the Fair Labor Standards Act, 29 U.S.C. § 216(b), the Commissioner has attempted to characterize Equal Pay Act liquidated damages as the equivalent of interest on the

[10] *Compare* SM 957, 1 C.B. 65 (1919) (libel damages not excludable), *and* SM 1384, 2 C.B. 71 (1920) (damages for alienation of affections not excludable), *with* Sol. Op. 132, I-1 C.B. 92 (1922), *superseded by* Rev. Rul. 74-77, 1974-1 C.B. 33 (damages for alienation of affections excludable).

[11] *Compare* Rev. Rul. 58-418, 1958-2 C.B. 18 (punitive damages in libel suit taxable), *superseded by* Rev. Rul. 85-98, 1985-2 C.B. 50, *with* Rev. Rul. 75-45, 1975-1 C.B. 47 (certain punitive damages may be excludable under Section 104(a)(2)), *revoked by* Rev. Rul. 84-108, 1984-2 C.B. 32.

use of money, *see Thompson* v. *Commissioner*, 866 F.2d 709 (4th Cir. 1989), while attempting to cast ADEA liquidated damages as punitive damages, *see Rickel* v. *Commissioner*, 900 F.2d 655 (3d Cir. 1990). The Government's attempt in the case of taxpayer Burke to ignore the distinction between an injury and the measure of an injury has not always characterized the Commissioner's interpretation of the tax laws. As recently as 1983, the Commissioner of Internal Revenue was directly advising taxpayers:

> Amounts received for personal injury or sickness are not compensation for lost wages or profits, even *when measured by the amount of wages or profits that could have been earned* if not for the injury or sickness. IRS Publication 525, p. 11 (Rev. Nov. 1983). (Emphasis added.)

Such vacillating interpretations in the face of an essentially unchanged statute suggest result-oriented resistance to any novel application of Section 104(a)(2).[12]

In the case of taxpayer Burke, it is still not clear precisely what criterion is being advanced. The Government argues initially that the criterion for excluding Title VII damages is the fact that the damage measure is with reference to work that has already been performed. Pet. Br. 15-20. A later footnote then attacks the ADEA cases despite the fact that no work has been performed. *Id.* 26,

[12] No essential amendments were made in this aspect of Section 104(a)(2) or its predecessors until the Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239, § 7641(a), 103 Stat. 2106, 2379, which removed from the exclusion rule of Section 104(a)(2) punitive damages in cases not involving physical injuries, generally effective with respect to amounts received after July 10, 1989. For purposes of Section 104(a)(2), ADEA liquidated damages are compensatory and not punitive. *Rickel* v. *Commissioner*, 900 F.2d 655 (3d Cir. 1990).

n. 20. The rationale for treating ADEA and Title VII claimants alike—that back pay represents compensation for services that should have been paid but was not—conflicts with the Commissioner's announced positions on excludability of more traditional tort victims' lost earnings damages.

The Government would apply Section 104(a)(2) to employees who by tortious action have been denied the opportunity to profit from work. Rev. Rul. 85-98, 1985-2 C.B. 50. But the emphasis on total incapacity to work suggests that the Government would introduce into the statute a implicit limitation that would exclude from the category of personal injury damages any amounts measured by wage differentials attributable to reduced ability, even though such differentials may have been caused by tortious action. There is no basis in tort law for making distinctions between the tort victim who loses a job and the tort victim who stays employed but loses the opportunity to earn extra wages, such as the defamed employee who is denied a promotion[13] or the negligently injured employee who is prevented from working overtime[14] or prevented from moving to a higher paying job.[15] The tort is the same, although the measure of damages may vary.[16]

[13] *Cf. M. Rosenberg & Sons* v. *Craft*, 182 Va. 512, 29 S.E.2d 375, (1944) (insufficient evidence was found to support the otherwise acknowledged cause of action).

[14] *Tijerina* v. *Cornelius Christian Church*, 273 Or. 58, 539 P.2d 634 (1975).

[15] *Missouri Pacific Railroad Co.* v. *Harelson*, 238 Ark. 452, 382 S.W.2d 900 (1964).

[16] The Government's reliance on the concepts of past services and hypothetical services reintroduces in another guise a dichotomy, now rejected by the courts, between damages to personal reputation and damages to professional reputation. *See Threlkeld* v. *Commissioner*, 848 F.2d 81 (6th Cir. 1988); *Roemer* v. *Commissioner*, 716 F.2d 693 (9th Cir. 1983).

Therefore, there can be no justification under Section 104(a)(2), whose regulations invoke "tort or tort type" standards, for distinguishing between an individual whose damage measure reflects complete inability to work and one whose damage measure reflects only partial capacity.

II. THE COURT SHOULD RESIST THE GOVERNMENT'S SUGGESTION TO EXTEND ITS ANALYSIS OF THE TAXPAYERS' CASE TO ADEA CLAIMANTS NOT BEFORE THE COURT

The Court should resist the Government's invitation to resolve the case of the taxpayers in a manner that extends to other classes of claimants whose cases are not under consideration. Denying the benefits of Section 104(a)(2) to ADEA victims leads immediately to inconsistencies, for there is no principled way of preventing the same theory from reaching any tort victim whose damages are measured by lost or reduced earnings.

Age discrimination is recognized to be a personal injury within the meaning of Section 104(a)(2).[17] Only a portion of ADEA damages reflects earnings-based remedies; the remainder encompasses liquidated damages, fringe benefits, insurance benefits, pension benefits, and retirement benefits. 29 U.S.C. § 626(b). The two principal forms of damages received under the ADEA, lost earnings and liquidated damages, have been held excludable from income.[18]

[17] *Pistillo* v. *Commissioner*, 912 F.2d 145 (6th Cir. 1990); *Rickel* v. *Commissioner*, 900 F.2d 655 (3d Cir. 1990); *Downey* v. *Commissioner*, 97 T.C. 150 (1991); *Keller* v. *Commissioner*, 62 T.C.M. 401 (1991); *see also, Redfield* v. *Ins. Co. of North America*, 940 F.2d 542 (9th Cir. 1991).

[18] Other elements of ADEA damages do not appear to have been litigated, but under controlling precedent would similarly be excludable under Section 104(a)(2).

The Commissioner of Internal Revenue unsuccessfully argued for inclusion of lost earnings damages on the theory that such amounts were contractual in nature. *Rickel, supra.* The argument in favor of inclusion of liquidated damages contended that the latter were punitive damages for purposes of Section 104(a)(2). *Downey, supra.* The courts are now uniform in their rejection of these attempts by the Commissioner.

Whether ADEA liquidated damages are considered to have a compensatory or a punitive element for non-tax purposes[19] is not determinative of their characterization under the Internal Revenue Code. The Tax Court has stated unequivocally that ADEA liquidated damages are not punitive for purposes of Section 104(a)(2).[20]

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[19] *Compare Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), with *Overnight Motor Transp. Co., Inc.* v. *Missel*, 316 U.S. 572, 583-584 (1942), where the Court stated:

> [L]iquidated damages . . . are compensation, not a penalty or punishment by the Government. [citations omitted] The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages.

In *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707 (1945), the Court explained:

> [The award of liquidated damages] constitutes a Congressional recognition that the failure to pay . . . on time may be so detrimental to maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being.

[20] *Rickel, supra.* Punitive damages received in connection with personal injuries have been held includable in income only where they serve no compensatory purpose. *Miller* v. *Commissioner*, 914 F.2d 586, 591 (4th Cir. 1990) (distinguishing *Thompson, supra*, where the same court had held excludable under Section 104(a)(2) damages considered to serve deterrent and compensatory purposes).

Reenactment of a statute by Congress without substantial change should be construed as implicit Congressional approval of prevailing interpretations. *Provost* v. *United States*, 269 U.S. 443 (1926). In 1989, when it was apparent that courts were rejecting the Commissioner's litigating positions with respect to Section 104(a)(2), Congress considered several proposed statutory amendments. A bill introduced in the House of Representatives would have allowed the benefits of the exclusion rule of Section 104(a)(2) only with respect to personal injuries in cases involving physical injury or physical sickness.[21] The amendment that was eventually passed by Congress removed the protection of Section 104(a)(2) only with respect to punitive damages in cases not involving physical injury or physical sickness.[22] In 1989 Congress was presumptively[23] aware not only of the judicial interpretations in *Thompson* and *Rickel* treating Equal Pay Act and ADEA liquidated damages as excludable damages for personal injuries, but also of the unsuccessful administrative interpretations of such damages as taxable.

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[21] H.R. 3299, § 11641, introduced on September 20, 1989. The amendment was intended to reverse the burgeoning trend in the case law toward tax-free treatment in employment discrimination, among other areas. *See* H.R. Ways and Means Committee, *Revenue Reconciliation Bill of 1989, Explanation of the Revenue Provisions*, 238 (September 14, 1989).

[22] "[Section 104(a)(2) shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness." 26 U.S.C. § 104(a) (final sentence). *See* H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. 622-23, *reprinted in* 1989 U.S. Code Cong. & Admin. News 3225-26.

[23] *Cf. Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).

CONCLUSION

The Court should reaffirm the definition of personal injury that has guided the courts in construing Section 104(a)(2) and should reject the Government's unwarranted distinctions among classes of tort victims based partly on the measure of their injuries. Any fundamental distinctions proposed to be introduced into this law should be adopted only after due legislative and regulatory process.

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